SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 265

CLYDE-MALLORY LINES,
Libellant-Petitioner,

v.

STEAMSHIP EGLANTINE,
UNITED STATES OF AMERICA,
Intervenor-Respondent.

PETITIONER'S BRIEF

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SUBJECT INDEX

TABLE OF CASES CITED

TABLE OF STATUTES CITED

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PETITIONER'S BRIEF

Certiorari was granted on October 12, 1942 to review a decision of the Circuit Court of Appeals for the Fifth Circuit in admiralty reversing, with one dissent, a decree of the District Court for Eastern Louisiana, and dismissing petitioner's libel against steamship *Eglantine*.

The opinion of the Circuit Court of Appeals (R. 54-7) is reported at 127 F. (2d) 569 and that of the District Court (R. 44-9) at 38 F. Supp. 658.

Statement

This case arises out of a collision between petitioner's steamship *Brazos* and steamship *Eglantine* on December 21, 1932. At that time the *Eglantine* was owned by respondent and was operated as a merchant vessel (R. 18). On December 23, 1932 petitioner filed in the District Court for Southern New York a petition for limitation of liability

in which respondent duly appeared and made claim for the *Eglantine's* damages. The District Court held both vessels at fault. Respondent appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed. Thereafter petitioner and respondent stipulated the damages, it being agreed that the *Brazos'* damages exceeded the *Eglantine's* (R. 19). Meantime the *Eglantine* was sold by respondent to Lykes Bros.-Ripley Steamship Co. Inc. Thereafter on June 10, 1937 petitioner filed its libel in the District Court for Eastern Louisiana against the *Eglantine in rem* to recover one-half the difference between the *Brazos'* and the *Eglantine's* damages (R. 1-4). Process issued and the *Eglantine* was seized but was released without bond upon respondent's suggestion that it was a party at interest (R. 4-8).

After its intervention in petitioner's suit against the *Eglantine in rem*, respondent raised the defense that the suit was not brought within the two year statute of limitations contained in §5 of the Suits in Admiralty Act of March 9, 1920, 41 Stat. 526, 46 U. S. Code, §745. The case was tried upon stipulated facts (R. 18-19).

The Decisions Below

The District Court held (R. 44-9) that a lien accrued in favor of petitioner against the *Eglantine in rem* when the collision occurred, that this suit is against the privately owned *Eglantine in rem* and not against the United States and that the two year limitation in the Suits in Admiralty Act does not apply. It entered a decree in favor of petitioner for one-half the difference between the *Brazos'* and the *Eglantine's* damages (R. 49).

The Circuit Court of Appeals disregarded petitioner's collision lien, brushed aside the fact that this is not a suit against the United States but one against the privately owned *Eglantine in rem*, held that the cause of action was created by the Suits in Admiralty Act and applied the two year limitation of that Act (R. 54-7). Accordingly it reversed (R. 58).

Hutcheson, C. J. dissenting (R. 57).

Statutes Involved

§9, Shipping Act of 1916, 46 U. S. Code §808.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. *Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner*, in whole or in part, or hold any mortgage, lien, or other interest therein" (italics ours).

§§4, 5, Suits in Admiralty Act, March 9, 1920, 46 U. S. Code §§744, 745.

"§744. *Release of privately owned vessel after seizure.* If a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accord-

ance with the provisions of this chapter. (Mar. 9, 1920, c. 95, §4, 41 Stat. 526.)

§745. *Causes of action on which suits may be brought; limitations.* Suits as herein authorized shall be brought within two years after the cause of action arises." (Mar. 9, 1920, c. 95, §5, 41 Stat. 526.)

Question Presented

Does the two-year statute of limitations contained in §5 of the Suits in Admiralty Act limit the time within which suit may be brought against a privately owned vessel to recover for collision damage that occurred while such vessel was owned by the United States and employed as merchant vessel?

POINTS

I. The Court below erred in holding that petitioner's cause of action existed by virtue of the Suits in Admiralty Act.

The Circuit Court of Appeals held:

"The sovereign immunity of the United States having been waived, an action for tort arose; and the Suits in Admiralty Act was the only law by which this result was accomplished. Therefore, the cause of action existed by virtue of the Suits in Admiralty Act, was authorized only by that Act, and could not have been effectively prosecuted but for the provisions of that Act. * * * It thus appears that the cause of action here sued upon was created by virtue of the Suits in Admiralty Act; * * *" (R. 56-7).

This decision is the basis of the error in the Court below. Petitioner's cause of action was not created by

the Suits in Admiralty Act, but rather by the Shipping Act of 1916.

Section 9 of the Shipping Act of 1916 (*supra*, p. 3) provides that merchant vessels of the United States

"* * * shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part * * *".

In *The Lake Monroe*, 250 U. S. 246, this Court expressly held that by virtue of §9 of the Shipping Act of 1916 a collision lien arose against a vessel owned by the United States operated as a merchant vessel. The *Lake Monroe*, owned by the United States and operated as a merchant vessel, was in collision with the *Hellena*. The owners of the *Hellena* filed a libel against the *Lake Monroe in rem* and caused her to be seized by the United States Marshal under process issued pursuant to such libel. The United States applied to this Court for a writ of prohibition. The petition was dismissed, this Court holding that a collision lien arose, notwithstanding ownership by the United States, by virtue of the above quoted provisions of §9 of the Shipping Act of 1916.

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675, this Court, referring to the Shipping Act of 1916 said:

"By §9, any such vessel while employed solely as a merchant vessel was made subject to all laws, regulations and liabilities governing merchant vessels, when the United States was interested therein as owner in whole or in part, or otherwise. It was under this provision that vessels belonging to the United States engaged as merchant vessels were arrested and held in an action *in rem*. In *The Lake*

Monroe, 250 U. S. 246, we decided that such a merchant vessel was subject to judicial process in admiralty for the consequences of a collision" (pages 688-9).

Section 9 of the Shipping Act of 1916 was not repealed by the Suits in Admiralty Act. It appears today as §808 of Title 46 of the United States Code. Indeed, it was reenacted, with some amendment unimportant here, by §18 of the Act of June 5, 1920, c. 250, 41 Stat. 994, less than three months after the passage of the Suits in Admiralty Act.

The purpose of the Suits in Admiralty Act was to relieve the United States of the inconvenience and delay resulting from the liability of its merchant vessels to seizure.

In *Blamberg Brothers* v. *United States*, 260 U. S. 452, this Court said of the Suits in Admiralty Act:

"This act was passed to avoid the embarrassment to which the Government found itself subjected by the Act of September 7, 1916, c. 451, 39 Stat. 728, by the 9th section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens. *The Lake Monroe*, 250 U. S. 246" (p. 458).

In *Eastern Transportation Company* v. *United States*, 272 U. S. 675, *supra*, this Court said:

"• • • the substitution by the Suits in Admiralty Act was merely to furnish a balancing consideration for the immunity of the United States from seizure of its vessels employed as merchant vessels previously permitted • • •" (p. 686).

There is nothing in the Suits in Admiralty Act or the decisions construing it that indicates a purpose to abolish

the collision lien against merchant vessels of the United States.

Below, respondent referred to *The Western Maid*, 257 U. S. 419, and argued against the existence of a collision lien. But *The Western Maid* dealt with public, not merchant, vessels of the United States. That decision involved three collisions in each of which the Government vessel was a public vessel. The *Western Maid* was operated by the Army Transport Service and was manned by a Navy crew. The *Liberty* was a pilot boat manned by a Navy crew. The *Carolina* was in the Army Transport Service and was manned by an Army crew. This Court was careful to point out, at pages 431-2, that these were public not merchant vessels. Section 9 of the Shipping Act of 1916 relates to merchant vessels, not public vessels, and it is Section 9 that gives rise to the collision lien against merchant vessels of the United States. All that this Court held in *The Western Maid* in this connection was that since there is under the statute law, no counterpart of Section 9 of the Shipping Act of 1916 as relates to public vessels no collision lien arises as to public vessels.

II. The two-year limitation of the Suits in Admiralty Act does not apply to this suit.

This is not a suit against the United States. It is a suit against a privately owned vessel *in rem* based upon a collision lien. The United States has voluntarily intervened in the suit—see libel (R. 1-4) and respondent's intervention (R. 5-7). Because petitioner had a collision lien against the *Eglantine*, and because the *Eglantine* was privately owned, petitioner brought this suit against

the *Eglantine in rem*. Petitioner did not sue the United States and did not need or resort to the waiver of sovereign immunity afforded by the Suits in Admiralty Act. Until the United States voluntarily intervened, this was a suit between private parties. The two-year limitation of Section 5 does not apply in these circumstances. Section 5 provides:

"Suits as herein authorized shall be brought within two years after the cause of action arises."

The critical words are "Suits as herein authorized". Since this is not a suit against the United States but one against the privately owned *Eglantine in rem*, it is not a "suit as herein authorized" and by its terms Section 5 does not apply. Two prior decisions, the only prior decisions on the point, both expressly so decide.

In *The Bascobal*, 295 Fed. 299 (C. C. A. 5) the Berwind-White Coal Mining Company libeled tug *Bâscobal* for the loss of coal shipped on board the barge *Richmond*, in tow of the *Bascobal*. The loss occurred while the *Bascobal* was owned by the United States and operated as a merchant vessel, but when the libel was filed the *Bascobal* had been sold and was privately owned. The suit was brought after the expiration of the time limitation in Section 5 and the *Bascobal* was seized under process but was released upon the intervention of the United States. The Court held that the Suits in Admiralty Act relates to suits against the United States, not to suits against privately owned vessels, even though they be upon causes of action that accrued while the vessel concerned was owned by the United States. The Court expressly held that Section 5 does not apply to this situation, saying:

"The above-quoted language of Section 5 of the Act shows that its provision as to the time within which suits shall be brought was intended to apply only to 'suits as herein authorized'. The suits which the Act authorizes do not include a libel against a merchant vessel or a tug which, at the time the libel is filed, is privately owned and operated and subject to arrest and seizure" (p. 301).

In *The Caddo*, 285 Fed. 643 (S. D. N. Y.; A. N. Hand, D. J.), barge *Caddo* was struck by tug *Retriever* (renamed *M. Moran*) while the tug was owned by the United States and operated as a merchant vessel. After the lapse of the time limitation provided by Section 5 of the Suits in Admiralty Act, and after the tug had been sold to private owners, she was libeled *in rem* and seized in a suit to recover the *Caddo's* collision damage. The United States intervened and excepted to the libel on the ground that it was not brought within the time limitation of Section 5. The Court held that Section 5 is not applicable to such a situation because a suit against a privately owned vessel upon a cause of action that arose during Government ownership is not one of the "suits as herein authorized."

The existence of Section 4 of the Suits in Admiralty Act (quoted *supra*, p. 3) indicates that the Congress did not intend the time limitation of Section 5 to apply where the Government vessel has been sold to private interests. Section 4 provides that where a privately owned vessel is seized upon a cause of action that arose during Government ownership and operation as a merchant vessel, it shall be released without bond upon suggestion of the interest of the United States

"* * * and *thereafter* such cause shall proceed against the United States in accordance with the provisions of this chapter."

In other words, since the limitation provided by Section 5 is directed towards the institution of suit, and since suits against privately owned vessels upon a cause of action that arose during Government ownership need proceed in accordance with the Act only *after* suit has been instituted and the Government has intervened, the limitation of Section 5 is inapplicable.

The Act itself contains by definition substantial evidence that this is not one of the "suits as herein authorized" by the Act—and it is only to "suits as herein authorized" that the time limitation of Section 5 applies. Section 8 of the Act provides:

"Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of Section 744 (Section 4 of the Act) * * * shall * * * be paid by the proper accounting officers of the United States * * *" (41 Stat. 527; Title 46, U. S. Code, Section 748).

This section provides for the payment of judgments in the various classes of cases to which the Act relates. One class is "any suit herein authorized", *i. e.* a suit in personam against the United States. Another class is "any final judgment within the purview of Section 744 [Section 4 of the Act]", *i. e.* a suit against a privately owned vessel upon a cause of action arising during prior Government ownership in which the United States has intervened. The Congress, therefore, plainly had in mind that a judgment obtained in the kind of suit to which Section 4 applies is not one of the "suits as herein authorized". If a suit to which Section 4 applies (this suit) were one of the "suits as herein authorized" it would not have been *separately* referred to in Section 8 as one of the classes of cases

in which judgments were to be paid by the proper accounting officers of the United States.

Respondent contended below that the Suits in Admiralty Act affords the exclusive remedy upon maritime claims against the United States and argued that this suit is therefore barred. This argument overlooks the fact that this is not a suit against the United States but one into which the United States has gratuitously injected itself and cut off appellee's private claim against a privately owned vessel. The argument also overlooks the fact that the Suits in Admiralty Act, by Section 4, expressly contemplates the possibility of such a suit as this, not a suit against the United States, and provides a method by means of which the United States may take over the defense.

The decisions of this Court, relied upon below by the respondent, are not determinative and do not even touch the question presented here. Quotations from the opinions should not be considered apart from the questions actually presented and decided. In *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros. & Company*, 276 U. S. 202, admiralty suits had been brought against the Emergency Fleet Corporation. Of the question presented for decision, this Court said:

"And the question here presented as to the effect of the [Suits in Admiralty] Act is whether, as the Fleet Corporation contends, the remedy given against it by a libel *in personam* in admiralty under the provisions of the Act, is exclusive; or whether, as the libelants contend, this remedy is not exclusive and the Fleet Corporation may also, as a private corporation, be sued in admiralty by a libel *in personam*, independently of the provisions of the Act" (p. 212).

All that the Court decided was that suits against the Emergency Fleet Corporation can be brought only under the Suits in Admiralty Act.

In *Federal Sugar Refining Co.* v. *United States*, 30 F. (2d) 254 (C. C. A. 2), no question was presented the decision of which is relevant here. Libellant's property, shipped on board a vessel owned by the United States, was damaged. Suit was brought against the United States under the Tucker Act more than two years after the cause of action arose. The only question was whether a suit against the United States under the Tucker Act could be brought after the enactment of the Suits in Admiralty Act.

That case, with others, was decided by this Court *sub nomine*, *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320. The *Johnson* case was an *action at law* brought against the Emergency Fleet Corporation in the courts of New York to recover damages for personal injuries. The *Lustgarten* case was an *action at law* brought against the Fleet Corporation in the District Court for Southern New York to recover for personal injuries. The *Royal Insurance Company* cases were *actions at law* against the Emergency Fleet Corporation in the courts of New York State to recover for loss and damage to cargo. Obviously none of these cases presented any question relevant to the suit at bar. The Fleet Corporation is not a party to this suit, nor is this suit either an action at law or a suit under the Tucker Act.

Eastern Transportation Company v. *United States*, 272 U. S. 675, does not consider whether the Suits in Admiralty Act is exclusive and holds only that the Act authorizes suits *in personam* in cases where there is no cause of action *in rem*.

By Section 9 of the Shipping Act of 1916 Congress determined upon the policy to be followed by the United States as concerns the liability of its merchant vessels. The policy adopted was that such vessels "shall be subject to all laws, regulations, and liabilities governing merchant vessels". At that time, Congress did not see fit to go beyond the inauguration of *in rem* liability. However, when the inconvenience arising from Section 9 of the Shipping Act of 1916 was brought home by the decision of this Court in *The Lake Monroe, supra*, Congress passed the Suits in Admiralty Act. Nowhere in that Act does Congress cut down the liabilities of merchant vessels provided for by Section 9 of the Shipping Act of 1916. The obvious purpose was to cut off only one of the incidents of *in rem* liability, *i. e.* seizure while in Government possession. To that end Congress provided for suits *in personam* and forbade the seizure of Government owned merchant vessels. The very existence of Section 4, making provision for the intervention of the United States in suits brought against privately owned vessels upon causes of action arising out of prior Government ownership, establishes beyond doubt that Congress had no intention of cutting down the effect of Section 9 of the Shipping Act of 1916, except only to circumvent the seizure of merchant vessels in the Government's possession.

Suits such as the one at bar were "authorized", by virtue of Section 9 of the Shipping Act of 1916. The Suits in Admiralty Act authorized only suits *in personam* against the United States. The time limitation of Section 5 is applicable only to "suits as herein authorized". It is not applicable to this case. By its decision below the Circuit Court, construing the Suits in Admiralty Act (which

has no relation to this suit whatever except to the extent that it authorized Government intervention), amended Section 9 of the Shipping Act of 1916 by adding thereto a statute of limitations where Congress saw fit to provide for no such statute but to rely upon the ordinary rules of laches obtaining between private parties.

There is, of course, no question of laches, or of the merits of petitioner's claim. The *Eglantine* had her day in Court in the limitation proceeding and, after a full and fair trial and after an appeal, both vessels were held at fault. The delay in bringing this suit has not prejudiced the United States in the slightest because the mutual fault of the *Eglantine* was fixed in timely litigation. The damages of the two vessels were stipulated and upon familiar principles the *Brazos* is entitled to recover from the *Eglantine* one-half the difference between their respective damages to the end that the mutual fault decision will result in each vessel bearing one-half the total damages.

III. The decree of the Circuit Court of Appeals should be reversed and the decree of the District Court reinstated, with costs.

Respectfully submitted,

CHAUNCEY I. CLARK,
EUGENE UNDERWOOD,
Counsel for Petitioner.

Dated: New York, N. Y., November 2, 1942.